PAUL M. JOVICK

IBLA 74-125 Decided April 7, 1975

Appeal from Alaska State Office, Bureau of Land Management, decision rejecting trade and manufacturing site purchase application F-1032, and canceling the claim.

Reversed.

1. Alaska: Trade and Manufacturing Sites

   One who has qualified for a patent to a trade and manufacturing site may legally take a partner into the business or contract for the sale of the business, and so long as he retains legal title and the sales contract remains executory on the part of the purchaser he is not thereby disqualified from receiving a patent.

2. Alaska: Trade and Manufacturing Sites: Equitable Adjudication: Generally -- Equitable Adjudication: Substantial Compliance

   Where the claimant of a trade and manufacturing site who has substantially complied with the requirements of law and regulation makes a legitimate contract for the conditional sale of the business to another before filing his application for patent, equitable adjudication will be invoked to prevent an intervening land classification action from operating to destroy the interest of both the claimant and his buyer and defeating the purpose of the Act.

APPEARANCES: Paul M. Jovick, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

An understanding of the background of this case is critical to an appreciation of the rationale of this decision.

Jovick filed his Notice of Location of Settlement or Occupancy of this 18 acres on May 22, 1968, having entered the land in February 1968. He operated a hunting camp, providing service and facilities to hunting parties, and serving as outfitter and guide. Many of the improvements, pack and saddle horses, and some of the equipage were on the land at that time, Jovick having purchased them from a previous owner. Jovick alleges that he engaged in the conduct of business on the site for the full 1968 season and during subsequent years, and he has supplied documentary evidence to prove it. It appears, therefore, that Jovick was eligible to receive a patent at any time from 1968, which is not disputed. Ray McNutt was also a hunting guide in another area, but McNutt was not a horse outfitter, so he referred clients to Jovick when the clients desired a hunting expedition which involved the use of horses.

On December 24, 1969, Multiple Use Classification F-955 operated to segregate the land from any further appropriation.

In 1969 Jovick and McNutt entered into a partnership whereby clients would hunt out of Jovick's T & M site using Jovick's horses and equipment, with McNutt supplying the clients and the aircraft.

In May 1971, Jovick and McNutt entered into a conditional sales contract by which Jovick agreed to sell McNutt the site, 15 specifically identified buildings, nine of the horses, and the equipment and supplies. By the terms of the agreement Jovick retained one cabin and all of his personal property located therein. The agreement also called for Jovick to assign his grazing lease, serial no. F-018180, to McNutt. McNutt made a down payment to Jovick of $4,000 and was to make annual installment payments of $2,000 plus interest. The improvements on the site at this time consisted of some eighteen cabins and outbuildings, a corral, a small cleared horse pasture, fences, and other incidentals. Recent photographs in the record show these to be well built and in good condition.

Jovick filed application for patent on May 30, 1972. Pursuant to that application a field examination was conducted. In his report of that examination the examiner noted that a legitimate business was being operated on the site, but took the position that because of the contract of sale, "Jovick was filing application to purchase on improvements in which he no longer had a vested interest." In an effort to try to save the situation the examiner then stated:

> Since the business is being operated in a legitimate manner, the possibility to having Ray McNutt file an application to purchase was considered in order to circumvent the aforementioned problem. This, however, is prevented by the land having been withdrawn by

> the Proposed Copper River Multiple Use Classification (5/16/68) and also by PLO 5180 (3/9/72).

Despite this, it appears that McNutt may have filed an application in his own name, as a memo dated August 22, 1973, (about 10 weeks later) makes reference to "the application to purchase filed by Mr. McNutt." However, there is no other reference to any such filing and no indication of whether there has been a final disposition of such an application, and the reference may simply represent a confusion of the partners' names.

Nevertheless, it is clear from the record at hand that it is the opinion of the Alaska State Office that McNutt may not file a new notice of location in his own name because of the segregative effect of the classification, nor may he rely on Jovick's location notice because although Jovick could legally sell his business, improvements and equipment to McNutt, McNutt could not acquire Jovick's date of settlement or any of his settlement rights. We agree with this assessment of the situation.

On the other hand, the Alaska State Office took the position that by reason of his execution of the sales contract Jovick "no longer had a vested interest."

By its decision of September 7, 1973, the Alaska State Office, on the basis of its conclusion that Jovick * * * "had no interest in the improvements or business located on the land involved," rejected Jovick's application to purchase. The decision also stated:

> Since the five-year statutory life of the claim expired on May 22, 1973 without the applicant having filed an acceptable Application to Purchase, the claim is cancelled.

In his appeal from this decision, Jovick makes the following assertions:

> In the decision it was stated that I had no interest in the improvements or business located on the land involved at the time I made application to purchase same. This is not true, I definitely had and still have a personal interest in the business.
>
> 1. I retained one cabin (known as the Paul Jovick Cabin) and its contents (on bill of sale dated May 1971 in case file).
> 2. I have control of the cabin known as the Cat Shed and its contents which houses a 22 Catapillar

Tractor and supplies for same. This Cat is used on the T&M.

3. I purchased twenty-two (22) horses from the previous operator (bill of sale included in case file) and only sold nine (9) of them to Ray McNutt.

I definitely had and still have a monetary interest in the business.

1. Having been on the land working at improvements and conducting business since February 1968 continuously through the fall season of 1971, though I needed some new contracts for prospective hunters, so came to town that last winter to work on booking hunts for the future. Decided to let my new partner stay in the bush looking after the business while I pursued this. Since there was no hunting season between fall of 1971 and May 1972 when I made application to purchase, I can truthfully say I was in possession of and occupying the land in question in good faith.

2. Since then have been booking hunts for the area for a percentage of the profit.

3. The adverse decision implies that I was paid in full for my improvements and business prior to my application to purchase the T&M site. This is also not true. You will find that in May 1972 I retained a fifty percent (50%) interest in the outfit. A payment was to be made May 25, 1972 - this payment was not made.

The decision further states "As the improvements and business located on the land does not now belong to Mr. Jovick, he is not entitled under the T&M Act to purchase the land involved." This is not true as I have just explained. Since they are not paid for - they are still mine. As of this date, November 8, 1973, I continue to have monetary interest as I have received only a token payment since the down payment making McNutt my partner.

I have applied to purchase in May 1972. In September 1973 was advised the five year statutory life of the claim had expired in May 1973 without an acceptable application

to purchase. It is not my fault it was 1 1/2 years from my application before I learned the application was not acceptable so that I could give further statements.

The consequences flowing from the conclusion reached in the decision below are, in our view, manifestly unfair and unjust, and would frustrate the very purpose of the law under which the appellant is claiming. Both Jovick and McNutt will be deprived of their respective interests in the property, neither will get the land despite substantial compliance with the law, and a legitimate and apparently active business enterprise will be destroyed, contrary to what we conceive to be the public interest. The sole reason for this calamity is that Jovick made the error of contracting for the sale of his business to McNutt after the land classification action and before applying for a patent.

The State Office was wrong in its finding that appellant had no interest in the business or the improvements on the site. Aside from the cabin which was excepted from the sale, the remaining 13 horses, and the implement shed and tractor, which are not referred to in the contract, Jovick quite obviously holds legal title to the property which was the subject of the sale, while McNutt acquired an equitable interest therein. Since McNutt has not fully performed his obligation under the contract, it is questionable whether he has the full equitable title or whether Jovick retains an equitable interest to the extent of the unpaid balance in addition to full legal title. This question could be resolved by reference to the law of the State of Alaska, but the distinction is not critical to our resolution of the case.

The essential question to be resolved here is whether Jovick, after contracting with McNutt, retains a sufficient interest in the improvements to support his application for patent. With reference to the ownership of the improvements the statute provides only that an applicant may purchase one claim "* * * upon submission of proof that said area embraces improvements of the claimant * * *" 43 U.S.C. § 687a (1970). (Emphasis added.) The regulation, 43 CFR 2562.3(d)(1), states only that the application must show "* * * that [the land] embraces the applicant's improvements * * *" (Emphasis added). While both of these requirements make it clear that the improvements should belong to the appellant, neither characterize in any way the nature or extent of the applicant's interest in the improvements. Let us suppose, for example, that an applicant for a T&M site conducted his business in metal buildings erected on the site, but instead of owning the buildings they were leased to him under a long-term contract. Would such an application be rejected because the buildings were not the "improvements of the claimant," or were not "the applicant's improvement"? Or, in another hypothetical example, the claimant

might have purchased the improvements on an installment payment contract which was still executory at the time he applied to purchase the land. Would that application be rejected and someone else had a lien or mortgage thereon, as well as the legal title thereto? I would not think so. 1/

The foregoing serves to illustrate that "ownership" of the improvements is not required by statute or regulation.

By any analysis Jovick retained a sufficient interest to be regarded as an "insurable interest." For example, if the premises were insured against loss by fire Jovick would be entitled to have his name listed in the policy's "loss payable" clause, and if a loss occurred, to receive a pro-rata share of the indemnity payment. Continental Fire Ins. Co. v. Brooks, 30 S. 876, 877 (Ala. 1901); Zenor v. Hayes, 81, N.E. 1144, 1145 (Ill, 1907).

Even where the State Highway Commissioner had filed a condemnation certificate prior to the fire and the statute provided that the title vested in the state upon the filing of the certificate, the condemnees were held to have an insurable interest because the state's title was defeasible. Home Ins. Co. of New York v. Dalis, 141 S.E. 2d 721 (Va. 1965).

In the event of a default by McNutt, which allegedly has already occurred, Jovick would regain whatever interest had passed to McNutt under the contract. Under these circumstances issuance of a patent to Jovick would not violate the rights of either, because if McNutt thereafter fulfills his contract Jovick can, and must, deed to him, but if McNutt defaults Jovick will simply retain the title which he had already earned prior to entering into the contract.

It should be clearly understood that Jovick and McNutt did nothing legally wrong in striking their bargain. Their contract violated no law or regulation. Where not specifically prohibited, the assignment of a possessory right in and to government lands has been judicially recognized, Carroll v. Price, 81 F. 137 (D. Alaska, 1896), and the assignment of a business operating on an unpatented trade and manufacturing site is not prohibited.

Likewise, the creation of the partnership between Jovick and McNutt should not be interpreted as creating an interest which

1/ Judge Goss feels there is a question as to whether improvements leased by an applicant would be acceptable as applicant's or claimants improvements, and that a degree of ownership of the improvements is required.

would foreclose Jovick from applying for patent in his own name. If the locator of a trade and manufacturing site establishes a legitimate business enterprise on the site and otherwise complies with the law, but takes a partner before obtaining fee title to the land, we see nothing in the statute, regulations or in the nature of the partnership relationship which would, in effect, nullify the location notice. There are highly significant differences between a corporation and a partnership, particularly with respect to the ownership interest of the partners in the property devoted to the business of the partnership, and it is the question of Jovick's interest in the property which is at issue. It is not settled law that a partnership is a separate legal entity at all, even under the Uniform Partnership Act, which Alaska has adopted. 59 Am. Jur. 2d. Partnerships § 6. 2/

Section 687a requires that a claimant be "in possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry * * *." Where a vendor has voluntarily put a purchaser in possession under an executory contract of sale, the possession of the purchaser is in effect the possession of the vendor. Smith v. Nyreen, 81 N.W. 2d 769 (N.D. 1957); In the Matter of Department of Public Parks, 73 N.Y. 560 (1878). Jovick continued in full possession of that portion of the site which was exempted from the conditional sale, and he continued in constructive possession of the remainder.

The question of whether Jovick continued to be "occupying" the entire site is somewhat more difficult. However, the Department 3/ has stated that occupancy may be initiated by an agent and

2/ Jovick has stated on appeal that he is a partner, and that he receives a percentage of the net profits, in return for which he books hunts for the business. While there is nothing in the record to corroborate this assertion, it could not be disproved without a hearing, which is unnecessary to our conclusion.

3/ Courts have ruled that the good faith occupancy of a tenant of the owner of an equity of redemption is the occupancy of the owner. Docking v. Holley, 120 Kan. 344, 243 P. 286, 287 (1929). Under the homestead exemption, it has been held that the law does not use the word "occupied" in any narrow or limited sense: "[t]he word 'occupied' does not always require an actual occupancy, but it may sometimes permit a constructive occupancy." Kerns v. Warden, 88 Okl. 297, 213 P. 70 (1923); Ashton v. Ingle, 20 Kan. 670, 27 Am. Rep. 197 (1878). While at the inception of a homestead, occupancy must be actual, once a homestead has been established by actual occupancy, then constructive occupancy may be sufficient to retain it. Currier v. Woodward, 62 N.H. 63 (1882); Holden v. Pinney, 6 Cal. 245 (1856).

maintained by a tenant, under the Act of May 14, 1890. Bowie v. Graff, 21 L.D. 522 (1895). Under 43 U.S.C. § 270-1 (1970) while occupancy implies some substantial actual possession and use of the land, at least potentially exclusive of others, such as results from residence of cultivation, the storage of a boat is occupancy of the portion of land so used. Herbert H. Hilscher, 67 I.D. 410, 416 (1960). The conditional sale contract herein was executory; since it did not provide for any reversion in event of nonperformance, it is assumed that legal title was not to pass until the terms of the contract were performed. The seller reserved the right to go on the property to conduct business in the portion not sold. It is only realistic to assume both parties intended that the seller retain sufficient rights to protect the application until buyer qualified in his own right.

The case which most closely resembles this case is Kennecott Copper Corporation, 8 IBLA 21, 79 I.D. 636 (1972), a decision which we support. However, we discern several critical differences which distinguish Kennecott from the case at hand. In that case a notice of location was filed by one Parker. Almost immediately thereafter Kennecott Copper Corporation moved onto the site and commenced construction of its improvements. Kennecott never filed a notice of location and Parker never did anything to fulfill the requirements of the law, either by way of occupancy, constructing improvements, or utilizing the land for any purpose of his own. After the imposition of a withdrawal, Kennecott attempted to rely on Parker's location notice by showing that the corporation had received from Parker a quitclaim of Parker's interest in the land, "if any." Parker, of course, had none. By contrast, the case at hand involves a locator who qualified for patent and then contracted to sell his business to another, but who still retains a legally defined interest in the subject of the sale.

In our opinion, the Congress, in enacting this statute, intended to encourage settlement of the land and to stimulate the creation of business for the improvement of Alaska's economy. That purpose has certainly been achieved in this case, but the results reached in the decision below would frustrate that purpose. If that decision were sustained the business would cease to operate, the extensive, well constructed and neatly maintained improvements would probably deteriorate into ruin, both Jovick and McNutt would be deprived of the fruits of their investments and labor, and the United States would regain full control of 18 acres of remote land. By no means can such a result be said to be in furtherance of the purposes of the statute.

In the peculiar circumstances of this case we hold that Jovick's interest in the improvements is sufficient to support his application.

Alternatively, this case is one which cries out for an equitable resolution. Jovick had fully complied with the law, insofar as the record reflects, and had earned the right to receive a patent. The business is a legitimate and substantial one. His contract with McNutt violated no law or regulation. Both parties have acted in good faith, as obviously neither intended any dishonesty to the other or to the United States. Their sole error was their failure to perceive that the play of obscure and complex legal-technical rules would operate to convert their perfectly legal transaction into a vehicle which would destroy the interests of both.

This Board has previously established that the entryman of a claim such as this who has earned equitable title may transfer his rights to another, and the assignee will take the claim under the seller's notice of location, so that a subsequent withdrawal would not influence the rights of the parties. Dale R. Lindsey, 13 IBLA 107 (1973).

It has also been held that full equitable title has not been earned until all of the requirements have been met, including the filing of an application for patent. Solicitor's Opinion, 65 I.D. 39 (1958). By this rule Jovick would not have held full equitable title at the time of his contract with McNutt because he had not filed his application to purchase, although he did so subsequently. However, this fact does not constitute a bar to our affording equitable relief, because if Jovick had held the equitable title at the time he contracted with McNutt, that contract would have been legally efficacious, and no equitable relief would be necessary to save the parties from the consequences of their mistakes, since no mistake would have been made. It is only because a mistake was made that it is necessary to invoke equity to save appellant from losing that which otherwise would have been his legal entitlement. Solicitor's Opinion, supra.

The authority and the obligation of this Department to apply the principles of equity where warranted by circumstances was clearly articulated by the Supreme Court in Williams v. United States, 138 U.S. 514, 524 (1890), as follows:

> . . . The certification after selection by the State is to be approved by the Secretary of the Interior. This is no mere formal act. It gives to him no mere arbitrary discretion, but it does given power to prevent such a monstrous injustice as was sought to be accomplished by these proceedings. It gives the power to the Secretary to deny this application of the State, and refuse to approve its selection, and hold the title in the general government until,

> within the limits of existing law or by special act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the government.
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> We would not be misunderstood in respect to this matter. We do not mean to imply that any arbitrary discretion is vested in the Secretary; but we hold that the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

The latter portion of the foregoing was quoted verbatim by the Supreme Court in Knight v. U.S. Land Corp., 142 U.S. 161, 181 (1891).

Similarly Justice Van Devanter, then Circuit Judge, in deciding Rainbow v. Young, 161 F. 835 (8th Cir. 1908), quoted the following from the Supreme Court's opinion in United States v. MacDaniel, 10 U.S. 380 (1833):

> A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers there are numberless things which must be done, that can neither be anticipated nor defined,

and which are essential to the proper action of the government.
Attorney General Wickersham in an opinion addressed to the President said:

> As stated by Judge Taney when Attorney General, there is nothing in the nature of our institutions which requires officers of the Government to perpetuate an act of injustice in the name of the United States. (2 Op. 482.) On the contrary, I think the principles of morality underlying our republican form of government are such as to make it the duty of executive officers, so far as possible, to avoid working wrong or injustice to the people. 28 Op. Att'y-Gen. 121, 125 (1909).

In Knight v. U.S. Land Corp., supra, the Court said:

> . . . The general words of those sections [of the statutes] are not supposed to particularize every minute duty devolving on the Secretary and every special power bestowed upon him. There must be some latitude for construction. At 181.

Equitable adjudication is available where the law has been substantially complied with and where the error or informality is satisfactorily explained as being the result of ignorance or mistake, or any other sufficient reason not indicating bad faith, there being no lawful adverse claim. 43 CFR Part 1870. We regard this as precisely such a case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is reversed.

Edward W. Stuebing
Administrative Judge

I concur:

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE RITVO DISSENTING:

I respectfully dissent from the majority opinion. The relevant facts and applicable law were set out in the State Office decision as follows:

> On May 22, 1968, Mr. Paul M. Jovick filed a Notice of Location of Settlement or Occupancy for the land involved to be used as a Trade and Manufacturing Site. By Notice, dated July 1, 1968, Mr. Jovick was informed that his claim had been recorded.
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> An Application to Purchase the site was filed by Mr. Jovick on May 30, 1972.
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> The case record shows that Mr. Jovick sold to his partner, Mr. Ray McNutt, all of the improvements and his personal property located on the subject land. The Bill of Sale, dated May 25, 1971, conveyed 16 cabins, a corral, 2 shelters, and 9 horses located on the land to Mr. McNutt. Mr. Jovick also agreed to relinquish the subject Trade and Manufacturing Site to the buyer as soon as possible. Therefore, at the time Mr. Jovick filed his Application to Purchase on May 30, 1972, he had no interest in the improvements or business located on the land involved.
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> * * * * * * *
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> As the improvements and business located on the land do not now belong to Mr. Jovick, he is not entitled under the Trade and Manufacturing Act to purchase the land involved. Accordingly, this Application to Purchase must be and is hereby rejected.
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> Since the five-year statutory life of the claim expired on May 22, 1973, without the applicant having filed an acceptable Application to Purchase, the claim is cancelled. [1/] The case will be closed when this decision becomes final.

On appeal, Mr. Jovick asserts that the State Office erred with respect to its conclusion that he did not have an interest in the

1/ 43 U.S.C. § 687a-1 (1970), requires a claimant for a trade and manufacturing site to submit an application to purchase, along with the required proof or showing, within five years after the filing of the notice of claim.

hunting and guiding business or the related improvements on the site sufficient to qualify for a trade and manufacturing site. Appellant argues that: (1) he retained ownership in one cabin and its contents plus control of another cabin which housed a caterpillar tractor and supplies used on the site; he further implies that he still owns 13 horses as he only sold 9 of the original 22 that he purchased from the previous operator; (2) he has not received all of the installment payments due him on the sale of the improvements, and thus, they still belong to him; and (3) he still has a "monetary interest" in the business because at the time of the sale a new "partnership" was formed, with Jovick booking and guiding hunts for a percentage of the profits.

To begin with, appellant's initial argument is without merit. His retention of a single cabin plus alleged control over the tractor and its shed 2/ is insufficient to satisfy the requirements of the trade and manufacturing site law. The Bill of Sale indicates that the retained cabin, known as the Paul Jovick cabin, is a 12 by 14 foot log structure containing appellant's gear and property, and was reserved for his personal use. Buildings and equipment necessary to the operation of the hunting and guiding business were conveyed to McNutt. 3/ A trade and manufacturing site application will not be approved on the basis of ownership of improvements which are

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2/ There is no offer of evidence in the record substantiating appellant's claim to control over the caterpillar tractor and its shed.

3/ The Bill of Sale and Contract of May 25, 1971, reads in part:

"1. The seller agrees to relinquish the Trade and Manufacturing Site, Fairbanks Serial # F-1032, containing approximately eighteen (18) acres of land located at Chisana, Alaska, to the buyer, as soon as possible.

"2. The seller agrees to sell to the buyer all the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining to the T&M # F-1032 including the following buildings plus all equipment and supplies located in the buildings or on the above described Trade and Manufacturing Site with the following exception:

"One 12 X 14 log cabin known as the Paul Jovick cabin and all the personal gear and property of the seller located within same cabin. The seller agrees that should he ever decide to sell this cabin that the buyer would have the first choice to purchase same at a reasonable price.

"3. The seller further agrees to transfer the Grazing Lease, Fairbanks Serial # 018180, plus all improvements thereto and thereon to the buyer. This Grazing Lease # 018180 contains approximately 35,528 acres.

"4. The seller also agrees to transfer title to * * * [9] horses to the buyer: * * *."

insufficient for utilization in connection with the trade, manufacture or productive industry being operated on the site. Hershel E. Crutchfield, A-30876 (September 30, 1968).

Before discussing Jovick's other contentions, I pause to examine McNutt's situation. The Alaska State Office determined that following the May 25, 1971, sale, McNutt was conducting a hunting and guiding business on the subject site. 4/ Furthermore, a State Office memorandum dated August 22, 1973, indicates that McNutt filed an application for the site in his own name. The memorandum recommended rejection of McNutt's application because,

> * * * the person who purchased the improvements of a settler cannot acquire the original settler's date of settlement rights. Mr. McNutt's rights, if any, could not be considered to have begun prior to May 25, 1971, the date of the sale of the improvements. Multiple Use Classification F-955 withdrew the lands in question on December 24, 1968, prior to any settlement which could be claimed by Mr. McNutt, so his settlement after that date cannot be validated. In this connection, see also Kennecott Copper Corporation, 8 IBLA 21 [79 I.D. 636] (October 6, 1972). [5/]
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> * * * * * * *
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> This case file should be returned to the Fairbanks Land Office for rejection of the application to purchase filed by Mr. McNutt and closure of the original settlement claim.

4/ A Trade and Manufacturing Site Field Report, dated June 27, 1973, describes the physical characteristics of the land and improvements thereon, and notes that a "legitimate business is being operated out of this T&M site by the new owner and operator, Ray McNutt; * * *."

5/ Kennecott held that the land in dispute was withdrawn from appropriation and disposition by Public Land Order No. 4582, 34 F.R. 1025 (January 17, 1969), which stated that:

"Subject to valid existing rights * * * all public lands in Alaska * * * are hereby withdrawn from all forms of appropriation and disposition under the public land laws * * * for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska."

The withdrawals under P.L.O. 4582, as extended and modified, and P.L.O. 5180, 37 F.R. 5583 (1972), made pursuant to section 17(d)(1) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1616 (Supp. III, 1973) (which terminated the effect of P.L.O. 4582) are also applicable in this case.

In the Kennecott case, cited above, appellant, relying on Carroll v. Price, 81 F. 137 (D. Alas. 1896), maintained that a transferee of the possessory interest in a trade and manufacturing site could claim rights to federal land by virtue of the transferor's location. The Board responded to this argument as follows:

> That transfer of possessory interests in Federal lands and improvements thereon as between private parties may be made and recognized in court determinations of the possessory rights of such parties between themselves is not questioned. Carroll v. Price, however, does not support any argument that transfers between private parties control the disposition of public land from the United States. They do not. The Supreme Court in Tarpey v. Madsen, 178 U.S. 215, 221 (1900), has said:
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> > * * * notwithstanding this recognition of the rights of individual occupants as against all other individuals, it has been uniformly held that no rights are thus acquired as against the United States.
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> That opinion goes on to state that rights to federal lands must be gained by compliance with the governing federal laws. [8 IBLA at 31-32, 79 I.D. at 671.]

The State Office properly held that McNutt, as the transferee of Jovick's improvements, could not have the benefit of Jovick's rights; McNutt must look to his own activities, and if rights were not established prior to the withdrawal, he could acquire none thereafter. Dale R. Lindsey, 13 IBLA 107 (1973); Kennecott Copper Corp., supra.

In the Kennecott case, appellant had purchased a trade and manufacturing site by a quitclaim deed from one who had filed a notice of location for a trade and manufacturing site. Kennecott, without filing a notice of location of its own, erected a storage tank and other improvements on the land. Three and one half years later the land was withdrawn. A year and a half after the withdrawal, Kennecott filed an application to purchase. The Board held that Kennecott could not avail itself of its vendor's notice of location and, not having filed one of its own prior to the withdrawal, could not establish any right to purchase the land.

In Dale R. Lindsey, supra, Lindsey purchased on August 18, 1971, the improvements on two headquarters sites from individuals who had filed notices of location and otherwise complied in part with the headquarters site law, 43 U.S.C. § 687a (1970). However, the land was withdrawn on January 23, 1969. Despite Lindsey's

assertion that he was a qualified applicant because his vendors had complied with all the legal requirements and could have obtained a patent by their own applications, the Board affirmed the rejection of his application, holding that the vendors had not met all the requirements of the statute. Therefore, appellant could not acquire the rights his vendors had gained by their settlements, and after the withdrawal he could not establish any rights of his own.

In a recent case, Ralph Edmund Marshall, 14 IBLA 233 (1974), the facts were the same as in Kennecott, except the case involved a headquarters site and the appellant was the original locator. Again the application to purchase was rejected. In Kennecott and Lindsey, no illegal activity was present with respect to the transfer of possessory interests in federal lands and the improvements thereon as between the private parties, yet, as in Marshall also, equally harsh results were compelled due to appellants' failures to comply with the requirements of federal law. Again, in Edwin William Seiler, 16 IBLA 352 (1974), an investment of $110,000 and appellant's major source of livelihood for eight years were destroyed for failure to comply with the legal requirements of the trade and manufacturing site law. In Grady C. Price, 17 IBLA 98 (1974), an investment of $2,200 in a homesite claim was negated under circumstances somewhat similar to McNutt-Jovick's. Cf. Francis P. Carlisle, 24 L.D. 581 (1897).

The present case raises the issue of whether Jovick, as the vendor, can establish a right to purchase the trade and manufacturing site when McNutt, his vendee, cannot.

Following rejection of McNutt's application, the State Office, in its decision of September 7, 1973, held that Jovick could not do so. It rejected appellant's application on the basis of his failure to establish that he was the owner of the business and improvements on the site following his sale of them to McNutt. Appellant argues as his second point on appeal that he has retained ownership of the improvements on the site during the period that installments are to be paid on the contract, and is thus still a qualified applicant. Two questions must be answered in response to appellant's argument. First, what interest has appellant retained with respect to the improvements on the site? Second, is this interest sufficient to allow appellant to qualify for a site under the trade and manufacturing site law?

Title I, Alaska Statutes, General Provisions, Section 01.10.060 (1962), provides that "real property" is coextensive with land, tenements and hereditaments. Thus, under Alaska law, the sale of the improvements on the subject site was a conveyance of real property. See Title 34, Alaska Statutes, Property, Section 34.15.350 (1962). Generally, the vendee of realty under an installment contract is considered the owner, with the vendor retaining mere legal title.

See 91 C.J.S. Vendor & Purchaser § 106 (1955), and cases cited therein. I am of the opinion that an applicant for a trade and manufacturing site who has retained bare, legal title to the improvements on the site after having sold the improvements and business to another, has not satisfied the requirements of the trade and manufacturing site law. This is Jovick's situation.

The applicable statute, Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1970), states that:

> Any citizen * * * or any association of such citizens, or any corporation * * * [1] in the possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim * * * upon submission of proof that said area embraces [2] improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry * * *. (Emphasis added.)

The statute clearly demonstrates Congressional intention that only those persons (1) in possession and occupation of a site which (2) embraces "improvements of the claimant," used for business purposes, should be allowed to qualify for a trade and manufacturing site. All the evidence in the record points to the conclusion that McNutt, the beneficial owner of the improvements, has occupied, appropriated and made claim to the subject site and improvements for his own use in the hunting and guiding business. Unfortunately, McNutt can claim no rights by virtue of Jovick's occupancy, and a new location in his own name was interdicted by the above-mentioned withdrawal.

Despite this result, the difficulty is one of appellant's own making. He apparently had qualified to purchase the site, and he could have done so before the withdrawal or thereafter. Prior to the withdrawal, there being no other impediment, a successor to Jovick's improvements could have qualified himself and purchased the land in his own name. The withdrawal, however, cut off the right of anyone but Jovick to establish a trade and manufacturing site on the land. Jovick had a nontransferable interest in the site. When he chose to leave the business himself without having received a patent or having taken all the steps necessary to get one, there was no legal way he could transfer the benefits of his endeavors to another. The right he had established terminated at the time he left the business he was conducting on the land.

The situation would be clear if Jovick had made an outright sale to McNutt. Then it would be a plain case of the inability of a settler to assign his rights to a successor. The successor

would have to establish his own rights at a time when the land was available for settlement or occupation. Grady C. Price, supra; Kennecott Copper Corp., supra; Dale R. Lindsey, supra. The effect of these decisions cannot be avoided by permitting the vendor to apply in his own name for a patent which he might be obligated to transfer to his vendee. That the settler retains a security interest in the improvements sold does not alter the rule. To hold otherwise is to create a favored class -- assignors, those who might have been eligible to acquire land in their own right, but for reasons of their own chose not to. This class, and only this class, would be permitted to acquire land which is closed to all others. The law does not provide for such favoritism.

We must construe acts of Congress and regulations of this Department according to their manifest intent. It would be inconsistent with the purposes of the trade and manufacturing site law to allow one holding bare, legal title to improvements on a trade and manufacturing site to qualify for the site when the beneficial interest, use, possession, control, and claim to the business and improvements on the site reside in another. Accordingly, I would hold that the land applied for by appellant does not embrace "improvements of the claimant" within the meaning of the trade and manufacturing site law. See S.R.A., Inc. v. Minnesota, 327 U.S. 558, 565 (1945); Williams v. United States, 138 U.S. 514, 516 (1890); United States v. Hyde, 132 F. 545, 548-49 (N.D. Cal. 1904); Robert A. Davidson, 13 IBLA 368, 377-78 (1973) (dissenting opinion) (issue not discussed by majority); Frank O. O'Mea, 10 IBLA 187, 190 (1973); Howard M. Wilson, 63 I.D. 36, 38 (1956); Carter Blatchford, 53 I.D. 613, 614 (1932); Smith v. Longpre, 32 L.D. 226, 227 (1903); Leitch v. Moen, 18 L.D. 397, 399 (1894); Mitchell v. Land, 355 P.2d 682, 686 (Alas. 1960); In Re Briebach's Estate, 132 Mont. 437, 318 P.2d 223, 224 (1957); Parr-Richmond Industrial Corp. v. Boyd, 43 C.2d 157, 272 P.2d 16, 22 (1954); Kresse v. Ryerson, 64 Ariz. 291, 169 P.2d 850, 853 (1946); Griffin v. Seymour, 15 Colo. App. 487, 63 P. 809, 811 (1900).

There is another reason why Jovick is not a qualified applicant, which, while interwoven with the previous discussion, is also independent of it. The statute demands two qualifications of a claimant: (1) he must be in possession of and occupying public land for purposes of trade, and (2) the area claimed must embrace his improvements. It is apparent that the improvements on the claim are not Jovick's within the meaning of the act, that is, he has not met the second qualification. I also conclude that appellant has not met the first qualification.

The record includes statements, contracts, canceled checks and bills covering the two-year period from 1969 to 1971 that Jovick and McNutt were in partnership. However, following appellant's sale

of the business and improvements to McNutt in 1971, there is no evidence indicating that Jovick was in possession of and occupying the subject site for purposes of trade. All the evidence points to the conclusion that McNutt was in possession of and occupied the site for his own use in the hunting and guiding business. There is nothing in the bill of sale and contract to indicate that Jovick retained any interest in the business or that he was to have any right to occupy the site except for limited, personal use with respect to his retained cabin. Furthermore, the bill of sale required appellant to file a relinquishment of the trade and manufacturing site as soon as possible.

At most, Jovick was left with temporary legal title to the improvements. That, by itself, can no more qualify him as one in possession of and occupying public land for purposes of trade than would the leasing or mortgaging of improvements by one in possession and conducting a trade qualify his lessor or mortgagee. Accordingly, I find that appellant has not satisfied the first requirement in the statute, namely, that the applicant be in possession of and occupying public land for purposes of trade. Thus, for this reason also, Jovick is not a qualified applicant.

As a third argument, appellant alleges that McNutt is his partner. He asserts "I continue to have monetary interest as I have received only a token payment since the down payment making McNutt my partner." (Emphasis added.) In addition to the above allegation, the record includes a statement signed only by Jovick and witnessed by a John H. Watteu, dated May 25, 1971, the day of the conveyance to McNutt, which reads as follows:

> I, Paul M. Jovick do herein state, that I am to receive a percentage of the net profit from my Chisana Trade and Manufacturing site F-1032 until the contract between Ray McNutt and myself has been fully consumated. [sic]
>
> I am to guide during the 1971 hunting season and there after book hunts for the area. (Emphasis added.)

On February 3, 1969, Jovick and McNutt entered into a partnership for hunting in the Chisana area. The agreement read:

> To whom it may concern:
>
> Ray McNutt and Paul Jovick agree to a partnership for hunting the Chisana area with Ray McNutt furnishing the hunting clients and the aircraft and Paul

Jovick furnishing the horse outfit and the camping gear necessary to conduct the hunts.

Both Ray McNutt and Paul Jovick agree to share expenses and profits 50 (fifty) percent.

Termination of the partnership may be called at anytime by agreement of both parties.

Signed this day, 3 Feb. 1969, Ray McNutt, Paul Jovick. (Emphasis added.)

Assuming for the sake of argument that the creation of a new partnership would overcome Jovick's failure to establish that he is the owner of improvements used in the conduct of a trade on the site, there is no substantial evidence that after May 25, 1971, a partnership exists. Jovick presented no written agreement forming one. His assertion that one exists is based only on an attempt to convert his retained security interest into a partnership interest. Jovick's statement of May 25, 1971, supra, as to "a percentage of the profits" is consistent with his retained security interest. McNutt's obligation to pay off his debt to Jovick does not make Jovick his partner. See 59 Am. Jur. 2d Partnerships §§ 54, 56, 57, 61 (1955).

A partnership is created and exists only as a result of the mutual agreement of the parties. Eder v. Reddick, 46 Wash. 2d 41, 278 P.2d 356, 361 (1955); Sutherland v. Groseclose, 192 Okl. 58, 133 P.2d 888 (1943); 68 C.J.S. Partnership § 10, p. 414 (1955). When McNutt and Jovick intended to form a partnership, they knew how to go about it. The record indicates that the bill of sale dated May 25, 1971, was meant to dissolve the partnership created on February 3, 1969, between appellant and McNutt. There is no offer of evidence indicating that McNutt agreed to a new partnership venture. In fact, in a letter to the BLM dated June 15, 1973, McNutt stated "[The enclosed statements, etc.] were some of the expenditures and income of the partnership between me and Paul Jovick. They cover the two years the partnership was in effect." (Emphasis added.) Apparently McNutt believed the partnership was at an end in 1971.

Furthermore, while realty standing in the name of one or more partners may, under some circumstances, be treated as partnership property inuring to the benefit of all the partners, State v. Elsbury, 63 Nev. 463, 175 P.2d 430, 433 (1946); 68 C.J.S. Partnership § 85, p. 525 (1955), a clear showing disclosing such an understanding and intention among the parties is required. In re Peyton, 143 C.A. 2d 379, 299 P.2d 897, 899 (1956); United States Fidelity & Guar. Co. v. Dawson Produce Co., 200 Okl. 540, 197 P.2d 978, 983 (1948). Failure to make such a showing results in the presumption

that the property employed in the enterprise belongs to the individual partners subject to its use in partnership operations. Fenton v. State Indus. Accident Comm., 199 Ore. 668, 264 P.2d 1037, 1039 (1953); 68 C.J.S. Partnership § 16, p. 425 (1955). In this instance, the conduct and agreements of the parties did not indicate that McNutt, the beneficial owner of the improvements, ever intended that a partnership entity should hold title and make claim to the improvements on the site. Thus, even assuming the existence of this new partnership, Jovick's application would still be deficient as the site would fail to embrace the improvements of Jovick or the alleged partnership. 6/

One other point requires brief comment. The Department's regulations permit equitable adjudication to apply in instances where there has been "substantial compliance" with the law. 43 CFR 1871.1-1. I find on the record no basis for concluding that there has been substantial compliance with the requirements of the trade and manufacturing site law. At the time of filing his application, and thereafter, appellant neither possessed, occupied nor owned the business or improvements on the site. Accordingly, the principle of equitable adjudication does not arise in this case. United States v. Wells, 2 IBLA 247, 250-51, 78 I.D. 163, 165 (1971); United States v. Booth, 76 I.D. 73, 87 (1969); United States v. Lance, 73 I.D. 218,

6/ Appellant's third argument raises the possibility that his application could be considered as having been made on behalf of the alleged, newly-established partnership. See Hans Ewoldt, A-26171 (December 27, 1951); Alzada C. Carlisle, A-25671 (November 17, 1949); Louis Olson, A-24143 (February 18, 1946). Even if we assume, arguendo, that a new partnership was an association established at the time of the conveyance to McNutt and is recognized as the applicant claiming the improvements, the association would still be constrained by the identical problem faced by McNutt. The statute and the regulation both recognize an association of citizens as an entity separate from an individual citizen. It can initiate a trade and manufacturing site on its own. 43 CFR 2562.1(a) requires that any qualified association initiating a claim must file notice of the claim within 90 days after such initiation. Thus, the alleged newly-formed partnership association might be required to locate on its own behalf and it could derive no benefits from the original locator's activities. If this is so, at the time the association was formed, the subject site was withdrawn from all forms of appropriation and this effectively prevented the initiation of any other later claims to the site. Dale R. Lindsey, 13 IBLA 107, 109 (1973); Kennecott Copper Corp., 8 IBLA 21, 29, 79 I.D. 636, 640 (1972); Leon A. Webster, 7 IBLA 333, 334 (1972). This issue need not be decided since a new partnership was not created.

227 (1966), appeal dismissed, Lance v. Udall, Civil No. 1864 (D. Nev., Jan. 23, 1968); United States v. Johnson, A-30853 (March 7, 1968). Furthermore, the only mistake Jovick made was to assume that he remained eligible to obtain a patent after he sold the improvements and business to McNutt. This is a mistake of law. It is well established that equitable adjudication does not lie for a mistake of law. Killen v. Davidson, A-28871 (October 25, 1962); Robert Uptain, A-26956 (October 25, 1954).

Appellant has failed to satisfy the eligibility requirements for purchasing a trade and manufacturing site. Accordingly, his application was properly rejected. As the five-year period from the time of filing a notice of location to the time an acceptable purchase application must be filed has now expired, the claim was properly canceled. See 43 CFR 2562.3(c).

Therefore, I would affirm the decision of the State Office.

Martin Ritvo
Administrative Judge

19 IBLA 304